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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 1357

GENNARO BASCIANO et al.,

Petitioner,

v.

HAROLD HERKIMER, individually and as Executive Director of the New York City Employees Retirement System, etc. et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Preliminary Statement

The respondent, Harold Herkimer, Executive Director of the New York City Employees Retirement System, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the Court of Appeals for the Second Circuit in this

case. The opinion of the Court of Appeals is not yet reported, but has been reproduced and appended as appendix A to the petition, pages A-1 to A-14. The opinion of the District Court for the Southern District of New York, appendix B to the petition, is located at pages A-15 to A-18.

Statement of the Case

As both the Court of Appeals and the District Court noted, the material facts in this case are not in dispute (A-2, A-15). However, despite this essential lack of dispute, we do not accept as adequate the statement of the facts in the petition, and instead would refer the Court to the opinion of the Court of Appeals for a fuller statement of the relevant facts. In addition, we would especially note the following:

The Court of Appeals held (A-4, A-16), and petitioner admits this in his statement

of facts (Petition, at 4), that the Retirement System's Medical Board ("Board") concluded that Basciano was not disabled, and it was for this reason that he was held not eligible for accident disability retirement benefits. As the Court of Appeals noted (A-10, n. 4), there is no issue presented here

> "of whether [petitioner's] injury was sustained as a result of city-service and was not a result of wilful negligence by the employee, these issues [being] quite different from the one here presented."

Thus, even assuming, as the courts below held, that the instant determination was required to satisfy due process standards, the issue presented here is what due process requires of respondents in the narrow context of a determination whether a member of the Retirement System is disabled.

Accordingly, to the extent petitioner here urges as a reason for the issuance of a

writ of certiorari the possibility of "Error on Non-Medical Issues" (Pet., pp. 10-15), it would seem that he must run afoul of this Court's policy to "avoid passing prematurely on constitutional questions." Kremens v. Bartley, 431 U.S. 119, 128 (1977). See Point I, infra.

POINT I

PETITIONER SEEKS TO RAISE ISSUES WHICH ARE NOT ADEQUATELY PRESENTED BY THE FACTS, AND NOT RIPE FOR ADJUDICATION.

Although the decision of the Court of Appeals was specifically limited to the narrow issue of the procedure due to a member of the Retirement system found not to be disabled, petitioner questions the constitutionality of procedures used by respondents and the Medical Board in the context of non-medical decisions.

Petitioner argues that the action was originally brought as a class action, that it should properly have been so certified, and that the issue of tne procedures used in making non-medical decisions would nave arisen in the context of such class action. However, class certification was not granted, and the record does not show facts sufficient to make an informed decision on the constitutionality of the procedures used in making non-medical determinations. The record does not show under what circumstances disability pension benefits are denied for non-medical reasons; nor does it show what kind of hearing is held, and whether an opportunity for cross-examination is provided.

Furthermore, there nas been no finding concerning what the New York courts have held due process to require in the context of non-medical determinations.

This Court has recently reaffirmed its policy "to avoid passing prematurely on constitutional questions." Kremens v. Bartley, 431 U.S. 119, 128 (1977); see also, New York City Transit Authority v. Beazer, 99 S. Ct. 1355, 1364 (1979). The issues petitioner seeks to raise concerning the constitutionality of respondents' procedures, in the context of non-medical determinations, are prematurely raised in that they are not presented by the facts of this case, and have not been decided by the New York courts.

POINT II

ASSUMING PETITIONER HAD A PROPERTY RIGHT IN RETIREMENT BENEFITS, THE PROCEDURE BY WHICH PETITIONER WAS FOUND NOT DISABLED SATISFIED THE DUE PROCESS REQUIREMENTS SET FORTH IN PRIOR DECISIONS OF THIS COURT.

The facts of the present case do not raise any constitutional questions con-

cerning the requirements of due process not already answered by this Court in Mathews v. Eldridge, 424 U.S. 319 (1976). The Court's discussion of the three distinct factors in Eldridge illuminating the requirements of due process -- the private interest affected by the official action, the risk of erroneous deprivation of such interest tnrough the procedures used as compared to the value of additional or substitute procedural safeguards, and the Government's interest -- is applicable as well to the facts of this case.

1. The Private Interest Affected.

The Court in Eldridge found that, in view of the potential sources of temporary income available to one who has had disability retirement rights terminated, there was less reason in that case than in Goldberg v. Kelly, 397 U.S. 254 (1970), to

depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action. The instant case does not even involve the termination of benefits already received, but rather the initial determination of eligibility for retirement disability benefits. In addition petitioner here received payment and benefits from other sources.*

2. The Risk of Erroneous Deprivation and the Comparative Value of Additional Procedures.

Petitioner focuses much of his argument on the risk of error on non-medical issues, but as has been pointed out, supra, pp. 2-4, the facts of the present case do not properly raise such issues. This case, like Eldridge,

*The New York Workman's Compensation Board and the Social Security Administration (A-4, n. 1, A-10)

involves a medical assessment of petitioner's disability.

As petitioner notes, the Medical Board does not keep a record of reversals on reconsideration or through state judicial review; however, petitioner admits the similarity between this case and Eldridge when he seeks to adopt the reversal rate cited in Eldridge as evidence of the risk of error by respondents (Petition, p. 16). His argument is flawed to the extent that he cites the reversal rate of 58.6% relied upon by the petitioner in Eldridge, but rejected by this Court. Eldridge held instead that the reversal rate was actually 12.2%, or, netting out reconsideration reversals requiring a median period of two months before determination, as low as 3.3%. 424 U.S. at 346, n. 29.

Instead of the procedure presently used to determine disability, consisting

essentially of a decision on the basis of medical reports, x-rays, and other documentation submitted by doctors and experts for both sides, petitioner would require a hearing including the opportunity to appear and present oral testimony, and the opportunity to confront and cross-examine adverse witnesses. But, as this Court has held in two previous cases, Eldridge, supra, and Richardson v. Perales, 402 U.S. 389 (1971), such additional procedural burdens are not necessary in tne context of a determination of medical disability.

Perales took note of judicial recognition of "the reliability and probative worth of written medical reports even in formal trials" (402 U.S. at 405), and held that tne requirements of Goldberg v. Kelly, supra, were not applicable because, in cases such as this, "tne specter of ques-

tionable credibility and veracity is not present; there is professional disagreement witn the medical conclusions, to be sure, but there is no attack here upon the doctor's credibility or veracity" (402 U.S. at 407). Tne Court likewise distinguished Goldberg v. Kelly in its decision in Eldridge, noting that "the decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists... concerning a subject whom they have personally examined" and that "[t]he potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in Goldberg." 424 U.S. at 344-345.

3. The Government's Interest in Avoiding Additional Administrative Costs Not Necessary to Fair Determinations.

The Employees Retirement System is a fund set up for the protection of members, and relying to a great extent on the contributions of members. The additional administrative costs created by a decision requiring the procedures petitioner seeks would be borne largely by the member contributors, without guarantee that the additional procedures would significantly reduce the number of erroneous decisions. See, Eldridge, 424 U.S. at 347, 348, citing Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). In the absence of a showing that the present procedure is particularly error-prone, or that it deprives members of the right to a fair determination on the relevant evidence, due process

does not require the substitution of more expensive and time consuming procedures in the context of medical determinations.

Contrary to petitioner's claim (Pet. pp. 19, 20), the decision of the Court of Appeals was not a major departure from the precedents of this Court, but a direct application of the decisions in Eldridge and Perales, refusing to require a trial-type hearing in determinations of medical disability, to the very similar facts here.

POINT III

PETITIONER DOES NOT HAVE A PROPERTY RIGHT IN ANTICIPATED DISABILITY BENEFITS REQUIRING THE APPLICATION OF FEDERAL DUE PROCESS STANDARDS.

For the reasons already stated, respondents do not consider the granting of the instant petition for certiorari necessary or appropriate. In addition, it is our con-

tention that, even were certiorari to be granted, petitioner could not show a property right in disability benefits requiring the application of due process standards, because he has never enjoyed or been held entitled to those benefits.

For all the similarities between the present case and Eldridge, supra, there is an important distinction between the two: Whereas this case involves the initial determination as to eligibility for benefits, Eldridge involved the termination of benefits. See Eldridge, supra, 424 U.S. at 332 ("The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions... that the interest of an individual in continued receipt of these benefits is a statutorily

created 'property' interest protected by the Fifth Amendment." (Emphasis supplied)). Similarly, both Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 11 (1978), cited by the Court of Appeals, and Goldberg v. Kelly, supra, involved the termination of, respectively, services and benefits already enjoyed.

If there is a property interest in accident disability retirement benefits before one is found to qualify for such benefits, that entitlement is not assumed to be present, but must be determined with reference to New York state law. Bishop v. Wood, 426 U.S. 341, 344 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). However, the New York statute here relevant, New York City Administrative Code Section B3-40.0*, describes the entitlement

*The complete text of this Section is reproduced as note 3 to the Second Circuit opinion, found in Appendix A to the petition, at A-5 - A-6.

to such benefits in terms of the procedure to be used to determine disability:

> "Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or on his behalf in connection therewith shall be made upon the application [of enumerated persons]. If such medical examination and investigation shows that any member... is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, [and other conditions are met,] the medical board shall so certify to the board... and such board shall retire such member for accident disability forthwith."

In Arnett v. Kennedy, 416 U.S. 134, 152 (1974), Justice Rehnquist stated, in discussing the property right conferred by the Lloyd-LaFolette Act, "Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to hold that the substantive right may

be viewed wholly apart from the procedure provided for its enforcement."

Where a state entitlement is so deeply imbedded in the procedures for determining a member's eligibility for benefits, that entitlement should not be given an existence separate from the state procedures, triggering federal Constitutional due process requirements. If there is a property right at all before the determination of disability, it is a right to the fair and equitable application of the procedures provided by statute.

We do not believe the decisions of this Court have gone any further than this in regard to determinations of initial eligibility for benefits under State law, and for this Court to hold, as did the Court of Appeals here, that such an inchoate expectation is itself "property" in the constitutional sense would have serious implications for

our federal system. Neither this Court's analysis in Goldberg v. Kelly, nor the cases cited by it in its discussion of the "new property" require such a result.* And, if the "property" analysis adopted by the Court of Appeals in this case is taken to its logical conclusion, there is no way to avoid the implication that applicants for admission to State schools or colleges have a property right to such admission, bidders on public contracts have a similar right to be awarded the contracts they seek, and, of course, candidates for civil service appointments have a corresponding property interest in the jobs they apply for.

*See 397 U.S. 254, at 262, cases cited in text and in note 9. All of the cases there cited either involved a separate constitutional limitation on governmental action, such as the First or Fifth Amendments, or presented instances where either the benefit was already enjoyed (Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir., 1961), cert. denied, 368 U.S. 930 (1961)), or entry into a profession or business was being denied without due process. None of these cases, we submit, except for the Dixon case, in fact supports Goldberg v. Kelly's "property" analysis.

In all of these contexts, we submit, utilization of a property analysis as a means of subjecting state action to federal court scrutiny beyond what is already available under the Due Process and Equal Protection Clauses is clearly not necessary and would only work mischief.

CONCLUSION

The petition for a writ of certiorari should be denied.

April 13, 1979

Respectfully submitted,

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